

## Second Looks & Criminal Legislation

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*This Essay explores the relationship between second-look sentencing and retributive theory by focusing on the primary vehicle for authorizing and distributing punishment in most American jurisdictions: criminal legislation. Looking beyond debates over the import of evolving norms to desert judgments, the Essay argues that the central retributive issue presented by second-look policies is whether the long-term punishments imposed by criminal courts comport with the proportionality standards of any period. Using the District of Columbia's criminal statutes as a case study, the Essay explains how three pervasive legislative flaws—statutory overbreadth, mandatory minima, and offense overlap—combine to support (and in some instances require) extreme sentences for actors of comparatively minimal blameworthiness. The Essay argues that this finding, when viewed in light of the structural forces driving prosecutorial and judicial decision-making, provides reason to doubt the systemic proportionality of the severe punishments meted out in the District, as well as in other jurisdictions that suffer from similar legislative and structural problems. It also explains why this epistemic uncertainty supports authorizing courts to reevaluate (and in appropriate cases reduce) severe punishments through second-look sentencing reform—both in the District of Columbia and beyond.*

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Should we reevaluate the sentences of those we incarcerate for long periods of time for serious (and often violent) crimes? That is the question at the heart of the debate surrounding second-look sentencing, which affords a prisoner an opportunity

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to petition the court for a sentencing reduction after serving a fixed period of his or her sentence—typically, in the range of 10–20 years.<sup>1</sup>

The idea of judicially reevaluating lengthy sentences is not new.<sup>2</sup> But it has been newly invigorated by the recently completed Model Penal Code Sentencing Project, which recommends affording courts the authority “to hear and rule upon applications for modification of sentence from prisoners who have served 15 years of any sentence of imprisonment.”<sup>3</sup> In an era of mass incarceration and massive prison expenditures, the American Law Institute’s recommendation has garnered significant interest at the state and federal level.<sup>4</sup> And yet, as is so often the case in this criminal justice reform moment, attention and enthusiasm have yet to yield policy change—while the idea has also attracted significant pushback from prosecutors.<sup>5</sup>

The problem is in part a product of moral disagreement. Proponents of second-look sentencing tend to focus on the ways in which reevaluating—and in appropriate cases, reducing—long-term sentences promotes overall societal welfare, highlighting, for example, the potential benefits to public safety,<sup>6</sup> rehabilitation, the preservation of families, the efficient use of government resources,<sup>7</sup> and the

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<sup>1</sup> See, e.g., MODEL PENAL CODE: SENTENCING § 305.6 cmt. at 567 (AM. LAW INST., Proposed Official Draft 2017); Meghan J. Ryan, *Taking Another Look at Second-Look Sentencing*, 81 BROOK. L. REV. 149, 149 (2015).

<sup>2</sup> See, e.g., Shon Hopwood, *Second Looks & Second Chances*, 41 CARDOZO L. REV. 83, 90 (2019) (“A second look at reducing the sentence of someone who violated the criminal law has deep roots in American law.”); Douglas A. Berman, *Re-Balancing Fitness, Fairness, and Finality for Sentences*, 4 WAKE FOREST J.L. & POL’Y 151, 152 (2014).

<sup>3</sup> MODEL PENAL CODE: SENTENCING § 305.6 (AM. LAW INST., Proposed Official Draft 2017). After much deliberation, the ALI opted to articulate this provision through general “principles for legislation” incorporated into an appendix, rather than through “recommended black-letter statutory language” codified in the main text. *Id.*, cmt. at 567. The ALI pursued this route “because the provision envisions new institutional arrangements for prison-release decisions that have not been tested in practice.” *Id.*

<sup>4</sup> See, e.g., ABA Roundtable on “Second Look” Sentencing Reforms, 21 FED. SENT’G REP. 149, 149–225 (2009); Memorandum #25 from the D.C. Crim. Code Reform Comm’n to Advisory Group Members (Sept. 23, 2019), <https://ccrc.dc.gov/node/1432631>.

<sup>5</sup> See Michael Serota, *Taking a Second Look at (In)Justice*, U. CHI. L. REV. ONLINE (Jan. 23, 2020), <https://lawreviewblog.uchicago.edu/2020/01/23/taking-a-second-look-at-injustice-by-michael-serota/> (discussing the political controversy involving prosecutorial lobbying efforts against second-look sentencing in the District of Columbia); *infra* Part I.

<sup>6</sup> This is due to the criminogenic effect of prison, which is the idea that long sentences of incarceration can actually increase the probability a person will engage in future crimes. See, e.g., Daniel S. Nagin, Francis T. Cullen & Cheryl Lero Jonson, *Imprisonment and Reoffending*, 38 CRIME & JUST. 115, 125–26 (2009).

<sup>7</sup> One reason for this increased efficiency is the fact that recidivism rates decline markedly with age. See, e.g., Marie Gottschalk, *Sentenced to Life: Penal Reform and the Most Severe Sanctions*, 9 ANN. REV. L. & SOC. SCI. 353, 378 (2013); see also Tina Chiu, *It’s About Time: Aging Prisoners, Increasing Costs and Geriatric Release*, VERA INST. OF JUST. (Apr. 2010), <https://www.vera.org/>

effective integration of prisoners into their communities.<sup>8</sup> But these forward-looking, utilitarian objectives are materially different than the backward-looking, retributive conception of justice at the heart of much criminal law theory and community sentiment on matters of liability and punishment.<sup>9</sup> As a deontological matter, the primary goal of sentencing is proportionality, which requires punishment to be scaled in accordance with the blameworthiness of the defendant's conduct and his or her state of mind *at the time the crime was committed*.<sup>10</sup>

From this retributive vantage point, there appears to be little that second-look policies can meaningfully contribute to the pursuit of justice. To be sure, the drafters

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downloads/Publications/its-about-time-aging-prisoners-increasing-costs-and-geriatric-release/legacy\_downloads/Its-about-time-aging-prisoners-increasing-costs-and-geriatric-release.pdf.

<sup>8</sup> See, e.g., Hopwood, *supra* note 2; Cecelia Klingele, *Changing the Sentence Without Hiding the Truth: Judicial Sentence Modification as a Promising Method of Early Release*, 52 WM. & MARY L. REV. 465 (2010).

<sup>9</sup> See, e.g., MICHAEL MOORE, *PLACING BLAME: A THEORY OF THE CRIMINAL LAW* (Oxford University Press, 2010); GIDEON YAFFE, *THE AGE OF CULPABILITY: CHILDREN AND THE NATURE OF CRIMINAL RESPONSIBILITY* (Oxford University Press, 2019); Paul H. Robinson & Robert Kurzban, *Concordance and Conflict in Intuitions of Justice*, 91 MINN. L. REV. 1829 (2007); Michael Serota, *Proportional Mens Rea and the Future of Criminal Code Reform*, 52 WAKE FOREST L. REV. 1201 (2017).

The boundaries of retributivism are contested; however, for purposes of this Essay it suffices to understand the term as signifying “a broad tradition or group of theories that regards desert as the central concept to be analyzed and preserved in efforts to justify punishment and the penal law that authorizes its infliction.” Douglas Husak, “Broad” *Culpability and the Retributivist Dream*, 9 OHIO ST. J. CRIM. L. 449, 450 (2012). See also *id.* at 453 (“Despite their considerable differences, all desert theorists place the principle of proportionality near the heart of retributive justice.”).

<sup>10</sup> See, e.g., MOORE, *supra* note 9, at ch. 3; Husak, *supra* note 9, at 453; see also Gideon Yaffe, *Mens Rea by the Numbers*, 12 CRIM. L. & PHIL. 393, 401 (2018) (discussing the “division between deontic moral properties of acts—such as rightness, wrongness, permissibility, impermissibility, and so on—and evaluative moral properties of acts—such as goodness, badness, and so on”).

In this paper, I use the term “proportionality” as interchangeable with “desert,” eliding potential differences—not implicated here—for purposes of simplicity and accessibility. See, e.g., ANDREW VON HIRSCH & ANDREW ASHWORTH, *PROPORTIONATE SENTENCING: EXPLORING THE PRINCIPLES* 1 (2005) (treating the terms “proportionate” and “deserved” interchangeably in the punishment context); Mary Sigler, *Just Deserts, Prison Rape, and the Pleasing Fiction of Guideline Sentencing*, 38 ARIZ. ST. L.J. 561, 563 (2006) (“Retributivism . . . is centrally concerned with the imposition of suffering in proportion to an offender’s moral desert.”); see also YAFFE, *supra* note 9, at 117 (observing that “the concept of proportionality might, in the end, just be the concept of desert”).

By proportionality, I mean *retributive* proportionality, in contrast to the possibility of *utilitarian* proportionality. See, e.g., Richard S. Frase, *Excessive Prison Sentences, Punishment Goals, and the Eighth Amendment: “Proportionality” Relative to What?*, 89 MINN. L. REV. 571, 593 (2005); cf. *Ewing v. California*, 538 U.S. 11, 31 (2003) (Scalia, J., concurring) (“Proportionality . . . is inherently a concept tied to the penological goal of retribution.”). The contours of retributive proportionality are further discussed *infra* Part V.

For insightful discussions of the concept of blameworthiness, see T.M. SCANLON, *MORAL DIMENSIONS: PERMISSIBILITY, MEANING, BLAME*, ch. 4 (Harvard University Press, 2008), and the many contributions to D. JUSTIN COATES & NEAL A. TOGNAZZINI, *BLAME: ITS NATURE & NORMS* (Oxford University Press, 2018).

of the Model Penal Code ground their case for reevaluating long-term sentences on “[t]he prospect of evolving norms, which might render a proportionate prison sentence of one time period disproportionate in the next.”<sup>11</sup> However, upon closer consideration, it’s unclear whether contemporary norms offer a better guide for ensuring the proportionality of prior sentencing judgments.<sup>12</sup> For example, “[h]istory demonstrates that many of our moral views about criminal sentences are cyclical in nature; rather than evolving toward leniency—or in some other direction—Americans’ views of offenses like drug use and sexual assault vacillate between very serious and not so serious.”<sup>13</sup> And if that’s true, then the vicissitudes of public morality may offer “little persuasive reason” to believe that “new sentencers will reach more accurate conclusions on offense seriousness than the original sentencers in any given case.”<sup>14</sup>

While this debate over the import of evolving norms to desert judgments is fascinating, it arguably overlooks a more fundamental question at the intersection of retributive theory and second-look sentencing: how secure should we feel in the systemic justice of the long-term punishments dispensed a decade or more ago by American courts—under *any* measure of proportionality? Which is to say, rather than focusing on *which* era’s perspective on morality is right, we should instead take seriously the possibility that the long-term sentences implicated by second-look policies might not meet the conception of retributive justice of *any* period at all.

Indeed, the pathologies surrounding criminal justice policymaking provide us with little reason to expect our democratic process to yield proportionate sentencing outputs.<sup>15</sup> One cause for concern is political: legislators confront hydraulic pressure—stemming from the horrors of the daily news cycle—to pass superfluous statutes of increasing severity that are divorced from the kind of considered judgments of comparative blameworthiness at the heart of retributive proportionality.<sup>16</sup> But an even greater problem is ideological: many legislators have

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<sup>11</sup> As the drafters proceed to highlight:

[Recent] flux in community attitudes toward many drug offenses, homosexual acts as criminal offenses, and even crime categories as grave as homicide, such as when a battered spouse kills an abusive husband, or cases of euthanasia and assisted suicide. Looking more deeply into the American past, witchcraft, heresy, adultery, the sale and consumption of alcohol, and the rendering of aid to fugitive slaves were all at one time thought to be serious offenses.

MODEL PENAL CODE: SENTENCING § 305.6, cmt. at 567 (AM. LAW INST., Proposed Official Draft 2017).

<sup>12</sup> See Ryan, *supra* note 1, at 151.

<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

<sup>15</sup> See, e.g., William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505 (2001); RACHEL E. BARKOW, *PRISONERS OF POLITICS: BREAKING THE CYCLE OF MASS INCARCERATION*, ch. 1 (Oxford University Press, 2019).

<sup>16</sup> See, e.g., Paul H. Robinson & Michael T. Cahill, *The Accelerating Degradation of American Criminal Codes*, 56 HASTINGS L.J. 633 (2005); Sara Sun Beale, *What’s Law Got to Do with It? The Political, Social, Psychological and Other Non-Legal Factors Influencing the Development of*

endorsed the notion that we can effectively deter and incapacitate simply by increasing the grading of, and penalties attached to, individual offenses.<sup>17</sup> Not only does this widespread idea lack empirical support,<sup>18</sup> but it supports a distribution of punishment that—at least in theory—is in direct conflict with the goal of proportionality.<sup>19</sup>

Whether or not this conflict is actually borne out in a jurisdiction's sentencing judgments is central to framing the debate over second-look sentencing. In a penal system comprised of perfectly just punishment, one in which we have little basis to question the proportionality of the original judgments rendered, there would likely be little retributive benefit—and potentially significant cost—to reevaluating (and reducing) long-term sentences a decade or more after their initial imposition. But as the reality of a system drifts farther from this ideal, and the possibility of pervasive and identifiable disproportionality grows, the retributive calculus surrounding enactment of second-look provisions begins to look very different.<sup>20</sup> In that case, these policies may at some point afford courts—and by proxy their legislative principals<sup>21</sup>—an opportunity to materially diminish the overall level of disproportionality in the criminal justice system, while at the same time furthering a broad range of utilitarian values through measured sentencing reductions.

This Essay explores the prospect of retributively disproportionate punishment in America and its implications for second-look sentencing reform by focusing on the primary vehicle for authorizing and distributing punishment in most jurisdictions: criminal legislation. Using the District of Columbia's criminal statutes as a case study, I explain how pervasive legislative flaws—characteristic of criminal codes around the country—provide grounds for questioning the systemic proportionality of long-term punishments meted out by courts. The paper also explains why this epistemic uncertainty offers a compelling reason to authorize

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(*Federal*) *Criminal Law*, 1 BUFF. CRIM. L. REV. 23 (1997). For further discussion of proportionate sentencing, see *infra* Part V.

<sup>17</sup> See, e.g., Rachel E. Barkow, *Categorical Mistakes: The Flawed Framework of the Armed Career Criminal Act and Mandatory Minimum Sentencing*, 133 HARV. L. REV. 200 (2019); Paul H. Robinson & John M. Darley, *The Role of Deterrence in the Formulation of Criminal Law Rules: At Its Worst When Doing Its Best*, 91 GEO. L.J. 949 (2003).

<sup>18</sup> For good overviews of the current state of social science research on deterrence and incapacitation, see generally COUNCIL OF ECON. ADVISERS, EXEC. OFFICE OF THE PRESIDENT, *ECONOMIC PERSPECTIVES ON INCARCERATION AND THE CRIMINAL JUSTICE SYSTEM* (2016); NAT'L RESEARCH COUNCIL, *THE GROWTH OF INCARCERATION IN THE UNITED STATES, EXPLORING CAUSES AND CONSEQUENCES* (2014).

<sup>19</sup> See, e.g., Paul H. Robinson, *Hybrid Principals for the Distribution of Criminal Sanctions*, 82 NW. U. L. REV. 19 (1987); BARKOW, *supra* note 15, at ch. 2.

<sup>20</sup> Cf. Ryan, *supra* note 1, at 172 (“Neglect of the parsimony principle in the initial sentencing of an offender is an example of an instance in which a second look at a sentence may be justified under a retributive framework. In this case and others, the passage of time between the commission of the offense and the determination of punishment could sometimes be [retributively] useful . . .”).

<sup>21</sup> See, e.g., Ethan J. Leib, David L. Ponet & Michael Serota, *A Fiduciary Theory of Judging*, 101 CAL. L. REV. 699, 748 (2013).

courts to reevaluate (and in appropriate cases reduce) long-term punishments through second-look sentencing reform.

Part I provides an overview of the District of Columbia's local criminal justice system, explaining how it is a microcosm for policy trends nationwide, including the current debate over second-look sentencing reform. Thereafter, Part II provides an overview of the central role that criminal legislation plays in the District's sentencing policy, highlighting three systemic flaws from which the District's criminal statutes suffer: statutory overbreadth, mandatory minima, and offense overlap.

Parts III and IV use these three legislative flaws—as they arise under the D.C. Code—as the basis for illustrating the ways in which criminal statutes regularly authorize, and in some instances require, the imposition of extreme sentences upon actors of comparatively minimal blameworthiness. (Part III focuses on statutory overbreadth and mandatory minima, while Part IV centers on offense overlap.)

Part V then considers the implications of this finding. When viewed in light of the structural forces driving prosecutorial and judicial decision-making, these legislative flaws provide reason to doubt the systemic proportionality of the long-term punishments meted out in the District, as well as in other jurisdictions that suffer from similar legislative and structural problems.<sup>22</sup> I then explain why this epistemic uncertainty supports authorizing courts to reevaluate (and in appropriate cases reduce) long-term punishments through second-look sentencing reform—both in the District of Columbia and beyond.

## I. CRIME, PUNISHMENT, AND LEGISLATION IN THE DISTRICT OF COLUMBIA

The District of Columbia's local criminal justice system has long reflected our national conversation on matters of crime and punishment.<sup>23</sup> Physically proximate to the Department of Justice and the federal policy apparatus that surrounds it, the District's local criminal justice system is also helmed by the federally run U.S.

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<sup>22</sup> There are, of course, many other reasons (aside from flawed criminal legislation) to doubt the retributive justice of long-term sentences in America—most obvious is their disproportionate impact on underserved minority communities. *See, e.g.*, JAMES FORMAN, JR., *LOCKING UP OUR OWN: CRIME AND PUNISHMENT IN BLACK AMERICA* (Farrar, Strauss, and Giroux, 1st ed., 2017); Paul Butler, *The System Is Working the Way It Is Supposed to: The Limits of Criminal Justice Reform*, 104 GEO. L.J. 1419 (2016). The legislative arguments presented in this Essay are not intended to supplant these critiques, and, as discussed *infra* Part V, they are actually complementary to them given the influence of cognitive bias on prosecutorial decision-making, *see generally* Rachel E. Barkow, *Prosecutorial Administration: Prosecutor Bias and the Department of Justice*, 99 VA. L. REV. 271 (2013), as well as on judicial decision-making, *see generally* Jeffrey J. Rachlinski et. al., *Does Unconscious Racial Bias Affect Trial Judges?*, 84 NOTRE DAME L. REV. 1195 (2009).

<sup>23</sup> For an insightful account of the history and development of local criminal justice politics in the District of Columbia, *see* FORMAN, *supra* note 22; *see also* James Forman, Jr., *Racial Critiques of Mass Incarceration: Beyond the New Jim Crow*, 87 N.Y.U. L. REV. 21 (2012).

Attorney's Office for the District of Columbia (USAO-DC), which prosecutes—and, through historically robust lobbying efforts, helps to shape—most of the District's local felony offenses.<sup>24</sup>

Since the passage of Home Rule in 1973, the District's local legislative authority, the D.C. Council, has exercised primary responsibility over D.C. criminal justice policy (supplanting the U.S. Congress); however, the federal influence over local matters of crime and punishment has persisted.<sup>25</sup> This is well illustrated by the tough-on-crime sentencing policies the Council enacted—often working in lockstep with USAO-DC—during the late nineties and early aughts. This group of policies, which includes “Truth-in-Sentencing,”<sup>26</sup> the abolition of parole, and the adoption of severe mandatory minima, mirrored similarly severe policy trends around the nation.<sup>27</sup>

During a time of both high crime rates and punitive public attitudes, this type of approach to legislating crime may have made a certain kind of democratic sense. But the District's leaders and residents—like those in so many other jurisdictions—have since come face to face with these policies' destructive and disparate impact on the social fabric and well-being of minority communities (which constitute a majority in the District).<sup>28</sup> Informed by the recent surge in criminal justice data and research, the D.C. Council has more recently begun to chart a different path by enacting reform-oriented legislation that is a better fit with both the city's liberal politics and its technocratic approach to governance. Yet this has also put the District's elected officials in periodic conflict with USAO-DC, which has long had an anti-reform mindset that has only become more pronounced under the current presidential administration.

Perhaps nowhere is this conflict, or the corrosive political dynamics underlying it, more pronounced than in the present debate over second-look sentencing reform in the District. In 2016, the D.C. Council passed the Incarceration Reduction

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<sup>24</sup> The Office of the Attorney General for the District of Columbia (OAG) also serves in a prosecutorial capacity, with jurisdiction over juveniles for nearly all crimes, as well as over “adults who commit certain criminal offenses.” Office of the Att’y Gen., *Criminal Section*, OAG (last visited Apr. 12, 2020), <https://oag.dc.gov/about-oag/our-structure-divisions/public-safety-division/criminal-section> (describing the “five primary categories of criminal offenses” prosecuted by OAG).

<sup>25</sup> See The District of Columbia Self-Government and Governmental Reorganization Act of 1973, Pub. L. No. 93–198, 87 Stat. 774 (1973) (codified as amended at D.C. Code § 1–201.01 *et seq.*).

<sup>26</sup> That is, the requirement that prisoners serve 85%—or some other fixed and significant portion—of their sentences. See generally Susan Turner et al., *The Impact of Truth-in-Sentencing and Three Strikes Legislation: Prison Populations, State Budgets, and Crime Rates*, 11 STAN. L. & POL’Y REV. 75 (1999).

<sup>27</sup> See, e.g., Sentencing Reform Amendment Act of 2000, D.C. CODE § 13–302 (1981); Turner et al., *supra* note 26.

<sup>28</sup> See, e.g., Rachel E. Barkow, *Making Connections with the Wire: Telling the Stories Behind the Statistics*, 2018 U. CHI. LEGAL F. 25, 26 (2018) (“In the District of Columbia, more than 75% of black men can expect to be incarcerated during their lives.”); FORMAN, *supra* note 22, at 38.

Amendment Act (“IRAA”), which affords those incarcerated for serious crimes committed before the age of eighteen the opportunity to ask judges to reconsider—and, where appropriate, reduce—their sentences after they spend at least fifteen years in prison.<sup>29</sup> To grant these requests, judges are required to conclude that, in light of a range of factors, “the defendant is not a danger to the safety of any person or the community and that the interests of justice warrant a sentence modification.”<sup>30</sup> The court’s determination must also be reduced to a written opinion “stating the reasons for granting or denying the application,”<sup>31</sup> which is subject to review under “well-established standards of reasonableness.”<sup>32</sup>

After two years of successful implementation, the chair of the D.C. Council’s Committee on the Judiciary and Public Safety, Charles Allen, began working on a bill that would expand the IRAA’s modest reach.<sup>33</sup> Introduced in February 2019, the Second Look Amendment Act (“SLAA”) simply increases the age of eligibility under the IRAA from 18 to 25 at the time of the crime.<sup>34</sup> Initially, the SLAA received little attention. But that all changed in July 2019 when, after months of silence, USAO-DC responded with an aggressive public lobbying campaign opposing the bill.<sup>35</sup> In September, that campaign reached a crescendo with the Office’s inaccurate assertion that the District has one of the lowest incarceration rates in the nation<sup>36</sup>—when in reality, the District of Columbia has one of the highest incarceration rates in the country.<sup>37</sup> USAO-DC has since retracted this misstatement; however, the Office nevertheless continues to misrepresent other

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<sup>29</sup> D.C. CODE § 24-403.03(2) (2019).

<sup>30</sup> *Id.*

<sup>31</sup> *Id.*

<sup>32</sup> *Williams v. United States*, 205 A.3d 837, 854 (D.C. 2019).

<sup>33</sup> See, e.g., Mark Joseph Stern, *A Trump-Appointed Prosecutor Is Lobbying Against D.C.’s Modest Criminal Justice Reform*, SLATE (Aug. 12, 2019), <https://slate.com/news-and-politics/2019/08/us-attorney-jessie-liu-dc-juvenile-criminal-justice-reform.html>.

<sup>34</sup> See, e.g., Keith L. Alexander, *D.C. is Considering Giving More Prisoners a Chance for Early Release. Prosecutors are Pushing Back*, WASH. POST (Aug. 3, 2019), [https://www.washingtonpost.com/local/public-safety/dc-is-considering-giving-more-prisoners-a-chance-for-early-release-prosecutors-are-pushing-back/2019/08/03/c1b55312-a970-11e9-86dd-d7f0e60391e9\\_story.html](https://www.washingtonpost.com/local/public-safety/dc-is-considering-giving-more-prisoners-a-chance-for-early-release-prosecutors-are-pushing-back/2019/08/03/c1b55312-a970-11e9-86dd-d7f0e60391e9_story.html).

<sup>35</sup> See, e.g., Keith L. Alexander, *Push to Allow Some Violent Criminals a Chance at Early Release Causes U.S. Attorney for District to Come Out Fighting*, WASH. POST (Aug. 31, 2019), [https://www.washingtonpost.com/local/public-safety/push-to-allow-some-violent-criminals-a-chance-at-early-release-causes-us-attorney-for-district-to-come-out-fighting/2019/08/31/265be602-c459-11e9-9986-1fb3e4397be4\\_story.html](https://www.washingtonpost.com/local/public-safety/push-to-allow-some-violent-criminals-a-chance-at-early-release-causes-us-attorney-for-district-to-come-out-fighting/2019/08/31/265be602-c459-11e9-9986-1fb3e4397be4_story.html).

<sup>36</sup> Stern, *supra* note 33 (quoting USAO-DC prosecutor’s statement that “the District of Columbia has the lowest incarceration rate in the country”).

<sup>37</sup> *Fact: DC Has a Mass Incarceration Problem*, THE SENTENCING PROJECT (Sept. 11, 2019), <https://www.sentencingproject.org/news/fact-dc-mass-incarceration-problem/>.



aspects of the legislation, and still appears to be very much against affording judges expanded discretion to reevaluate lengthy prison sentences.<sup>38</sup>

Throughout the debate, proponents of the SLAA have largely focused on the utilitarian case for second-look sentencing policies, placing significant emphasis on the rehabilitative potential of those who commit crimes in their youth due to their ongoing state of cognitive development.<sup>39</sup> In contrast, the SLAA's opponents have sought to capitalize on both Willie Horton-style scare tactics<sup>40</sup> and crude retributive rhetoric, such as, for example, dismissing "a lot of talk about the brain science and the concern for [defendants] who are 16 to 24 years old" by highlighting the frequently young victims, whose "16- to 24-year-old brains were never developing because they're being prematurely snuffed out by violence that we need to be doing more to stop."<sup>41</sup> Rarely mentioned, though, is anything related to the scope, severity, or nature of the policies that actually authorized (and in some instances required) the imposition of the long-term sentences that the SLAA would subject to reevaluation, namely, the District's criminal statutes. This is a significant oversight for the reasons laid out in the next Part.

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<sup>38</sup> Specifically, the Office says that the law eliminates a judge's ability to consider the nature of the crime when deciding whether to reduce a sentence; however, "nothing in the law prevents judges from engaging in such consideration, and several provisions still in force effectively require them to do just that." James Forman, Jr., *Justice sometimes needs a do-over*, WASH. POST (Sept. 20, 2019), [https://www.washingtonpost.com/opinions/local-opinions/justice-sometimes-needs-a-do-over/2019/09/20/4216161a-d665-11e9-86ac-0f250cc91758\\_story.html](https://www.washingtonpost.com/opinions/local-opinions/justice-sometimes-needs-a-do-over/2019/09/20/4216161a-d665-11e9-86ac-0f250cc91758_story.html) (citing Brief, *Stewart v. United States*, in which USAO-DC encouraged the presiding judge to consider the defendant's crime because it is "essential context for evaluating other factors that remain relevant under the IRAA").

Aside from the Office's tactics, there are a number of grounds on which one might object to DC-USAO—a federal agency helmed by a presidentially-appointed U.S. Attorney—interfering with local D.C. criminal justice reform efforts, including: (1) the absence of democratic representation, *see* Ethan J. Leib, David L. Ponet, & Michael Serota, *Translating Fiduciary Principles into Public Law*, 126 HARV. L. REV. F. 91, 95 (2013); (2) the disruption of a meaningful dialogue between local legislators and their constituents, *see* Ethan J. Leib, Michael Serota, & David L. Ponet, *Fiduciary Principles and the Jury*, 55 WM. & MARY L. REV. 1109, 1141 (2014); and (3) the stifling of a valuable laboratory of experimentation, *see* Michael Serota & Michelle Singer, *Maintaining Healthy Laboratories of Experimentation: Federalism, Health Care Reform, and ERISA*, 99 CAL. L. REV. 557, 568 (2011).

<sup>39</sup> *See, e.g.*, Martin Austerhuhle, *A Bill That Could Let Young Violent Offenders Out Of Prison Early Is Dividing D.C. Officials, Feds*, DCIST (Aug. 22, 2019) <https://dcist.com/story/19/08/22/a-bill-that-could-let-young-violent-offenders-out-of-prison-early-is-dividing-d-c-officials-feds/> (noting arguments).

<sup>40</sup> *See generally* Rachel Withers, *George H.W. Bush's "Willie Horton" Ad Will Always Be the Reference Point for Dog-Whistle Racism*, VOX (Dec. 1, 2018), <https://www.vox.com/2018/12/1/18121221/george-hw-bush-willie-horton-dog-whistle-politics>.

<sup>41</sup> Stern, *supra* note 36 (quoting USAO-DC prosecutor).

## II. DISTRIBUTING PUNISHMENT THROUGH CRIMINAL LEGISLATION

Criminal statutes—both in the District and elsewhere—define the elements of crimes, thereby drawing the line between criminal and non-criminal conduct.<sup>42</sup> And they also set the minimum and maximum punishments governing offenses, while making morally salient distinctions between different forms of conduct.<sup>43</sup> The latter function is one of grading, which is the primary mechanism that policymakers have at their disposal to ensure a proportionate distribution of punishment.<sup>44</sup> By specifying the relative penal import of variances in social harm and accompanying states of mind, a legislative grading scheme provides sentencing courts with critical direction in determining where the upper and lower bounds of punishment lie for any given offense.<sup>45</sup>

This is not to say that legislative grading schemes are all that matter for purposes of facilitating proportionate sentencing. Sentencing guidelines also have an important role to play (at least in theory) by both fine-tuning and filling in critical details—it is very difficult, after all, for the legislature to address the comparative relevance of the whole spectrum of factors bearing on a criminal actor's blameworthiness.<sup>46</sup> That said, sentencing guidelines are not particularly well suited to making significant course corrections to legislative grading determinations.<sup>47</sup> Nor, as a matter of sentencing practice, do they really try to; instead, their primary function tends to be one of fitting variations in criminal history within preexisting legislative grading judgments.<sup>48</sup> This is particularly true in a jurisdiction such as the District of Columbia that merely has *advisory* sentencing guidelines, which are legally unenforceable,<sup>49</sup> incorporate wide sentencing ranges,<sup>50</sup> and are exceptionally malleable.<sup>51</sup>

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<sup>42</sup> See Serota, *supra* note 9, at 1214–16.

<sup>43</sup> See *id.*

<sup>44</sup> See *id.* at 1210–13.

<sup>45</sup> See *id.*

<sup>46</sup> See *id.* at 1218–19.

<sup>47</sup> See *id.*

<sup>48</sup> See *id.*

<sup>49</sup> See, e.g., D.C. CODE § 3-105(c) (2007) (D.C. Voluntary Sentencing Guidelines (DCVSG) “. . . shall not create any legally enforceable rights in any party . . .”); *Speaks v. United States*, 959 A.2d 712, 718 (D.C. 2008).

<sup>50</sup> See D.C. SENT’G AND CRIM. CODE REVISION COMM’N, VOLUNTARY SENT’G GUIDELINES MANUAL App’x A—Master Grid (2015) (enumerating top and bottom of each box on the sentencing grid).

<sup>51</sup> Consider just two examples. First, the Guidelines authorize judges to depart upwards from the already broad recommended sentencing range based on “manifest injustice” or in the presence of a fact, “comparable in gravity” to a list of ten other facts, that “aggravates substantially the seriousness of the offense or the defendant’s culpability.” DCVSG § 5.2.2(10), (11). See also D.C. SENT’G COMM’N, EVALUATION OF THE D.C. VOLUNTARY SENT’G GUIDELINES 28 (Mar. 24, 2017) (finding that,

In light of these attributes, the D.C. criminal code effectively provides the blueprint for punishment in the District. So it offers a useful gauge for evaluating the overarching proportionality of the sentences imposed by the trial judges on the D.C. Superior Court. But this is disconcerting—because even a cursory look at that blueprint raises significant warning signs. For one thing, local crime legislation in the District is the product of two overlapping legislative bodies: the U.S. Congress and the D.C. Council, which together have enacted countless statutory offenses.<sup>52</sup> Beyond that, the District is one of a minority of American jurisdictions that has never enacted a modern recodification of its criminal offenses (though one is in the works).<sup>53</sup> It is therefore unsurprising that the D.C. criminal code has been ranked as one of the worst in the nation.<sup>54</sup> There are many reasons for this ranking, but central to the discussion of proportionate sentencing in this Essay are three foundational flaws.

- (1) *Statutory overbreadth.* The first problem is statutory overbreadth, which arises when a criminal law is drafted too broadly and therefore subjects individuals who do not deserve to be held liable for an offense to the same range of sentencing consequences applicable to the most blameworthy actors covered by that offense.
- (2) *Mandatory minima.* The second problem is mandatory minima, which take away judicial discretion to individualize sentences for any actor whose conduct meets the threshold definition of an offense. When paired with an overbroad offense definition, mandatory minima effectively require the imposition of severe sentences upon those who are not even deserving of a conviction—let alone lengthy incarceration—for violation of a particular criminal statute.
- (3) *Offense overlap.* The third problem is offense overlap, which enables the aggregation of convictions and sentencing exposure—i.e., the

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between 2010 and 2015, 7.1% of sentences departed from Guidelines recommendations, and that in nearly 73% of these cases, courts did not even cite a departure reason). Second, the Guidelines are silent on whether the sentences for two or more substantially related violent offenses committed in a single course of conduct should be run consecutively or concurrently. *See* DCVSG § 6.1, 6.2 (stating rules of consecutive and concurrent sentencing, which are conspicuously silent on this issue).

The extent of the unguided policy discretion that results from this silence is illustrated by the discussion of offense overlap, *infra* Part IV.

<sup>52</sup> *See generally* D.C. CRIM. CODE REFORM COMM’N, REPORT NO. 1: RECOMMENDATIONS FOR ENACTMENT OF D.C. CODE TITLE 22 AND OTHER CHANGES TO CRIMINAL STATUTES (May 5, 2017), <http://lims.dccouncil.us/Download/38043/RC22-0053-Introduction.pdf>.

<sup>53</sup> *See* D.C. CODE § 3-152 (2019) (requiring D.C. Criminal Code Reform Commission to develop comprehensive revisions of criminal statutes).

<sup>54</sup> *See* Paul H. Robinson, Michael T. Cahill & Usman Mohammad, *The Five Worst (and Five Best) American Criminal Codes*, 95 NW. U. L. REV. 1, 60 (2000) (ranking the D.C. criminal code as 45th out of 52 American criminal codes).

statutory minimum, which is sometimes mandatory, and statutory maximum punishments—for violating substantially related criminal statutes under circumstances that involve commission of what is intuitively considered a single offense.

The next two Parts of this Essay will explore these problems by analyzing District statutes relevant to robbery and carjacking; however, it is important to note at the outset that this legislative exploration is only intended to be illustrative and that these same fundamental problems pervade the District's entire body of criminal legislation.

### III. STATUTORY OVERBREADTH & MANDATORY MINIMA

A good place to start the analysis is with the District's overbroad, century-old robbery statute, which was enacted by the U.S. Congress in 1901 but is still routinely charged today.<sup>55</sup> Typically, robbery is considered a violent offense, involving theft of property paired with the use or threat of force against a person. This is not the case in the District, whose robbery statute “criminalizes non-violent conduct beyond generic robbery.”<sup>56</sup> That idiosyncrasy stems from Congress's decision to include the phrase “stealthy seizure” as an alternative basis for committing robbery, which District courts have subsequently interpreted as providing for liability in situations “where no actual force or violence is involved, and the owner is oblivious of the taking.”<sup>57</sup>

This has led to the counterintuitive conclusion that non-violent acts such as pickpocketing<sup>58</sup> or quickly stealing a bike in the vicinity of the victim<sup>59</sup> constitute robbery in the District. As a result, individuals who engage in these non-violent acts are subject to the same 15-year statutory maximum penalty otherwise applicable to the violent robber. To be sure, District trial judges are not legally required to impose a 15-year sentence upon an actor who engages in non-violent theft from a person—or even someone who commits a more serious form of robbery.<sup>60</sup> But they are

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<sup>55</sup> D.C. CODE § 22-2801 (2013).

<sup>56</sup> *United States v. Villatoro-Medrano*, 464 F. App'x 666, 667 (9th Cir. 2012) (citing *Leak v. United States*, 757 A.2d 739, 742 (D.C. 2000)).

<sup>57</sup> *Ulmer v. United States*, 649 A.2d 295, 298 (D.C. 1994).

<sup>58</sup> *Turner v. United States*, 16 F.2d 535, 536 (D.C. Cir. 1926).

<sup>59</sup> *Leak*, 757 A.2d at 742–43.

<sup>60</sup> The District's robbery statute is subject to a two-year statutory minimum; however, unlike a *mandatory* minimum, the sentencing court need not actually impose two years of incarceration to satisfy it. See D.C. CODE § 22-2801 (2013).

authorized to do so, and very little—aside from social and professional norms—stands in a judge’s way should he or she choose to do so.<sup>61</sup>

This is in contrast to the District’s similarly overbroad carjacking statute, which subjects robbery-like conduct (involving a motor vehicle) to a 7-year *mandatory* minimum sentence accompanied by a 21-year statutory maximum.<sup>62</sup> The D.C. Council passed the relevant legislation during the peak of the tough-on-crime era in response to a particularly heinous incident involving a violent car theft that culminated in the victim’s death while being dragged behind her car.<sup>63</sup> Hastily drafted statutes enacted in response to newsworthy events are notoriously problematic, and this one is no exception.<sup>64</sup>

To begin, the statute was drafted in terms nearly identical to the robbery statute, allowing for “stealthy seizure” carjacking liability.<sup>65</sup> So again, although carjacking is typically thought of as a violent offense, the District’s carjacking statute applies without regard to whether any force was used, such as, for example, where the defendant jumps in the victim’s car at a gas station and drives away while the owner has his back turned.<sup>66</sup> At the same time, the District’s carjacking legislation is in important ways even broader than the robbery statute. For example, it incorporates an alternative “attempts” element into the offense definition. Thus, a person who merely tries, unsuccessfully, to steal a car in the District in the vicinity of its owner would—absent any force or even the threat of force—be subject to a guaranteed minimum of 7 years, with the potential of receiving three times that amount.

And this is merely the sentencing exposure confronting an *unarmed* vehicular thief under the District’s carjacking statute.<sup>67</sup> Indeed, however harsh a 7 to 21 year range may seem for what is (as defined) a non-violent offense, the severity grows exponentially once a weapon is introduced into the equation. That’s due to the District’s overbroad set of armed enhancements and aggravators, which apply new mandatory minima and statutory maxima to “crimes of violence” or “dangerous crimes” committed “while armed” with a “dangerous weapon.”<sup>68</sup> Each of the

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<sup>61</sup> Given the voluntary nature of the District’s sentencing guidelines, the only legally enforceable check on the District’s local trial judges imposing the most severe statutorily authorized punishment possible is the Eighth Amendment; however, the judiciary’s actual role in constitutionally policing disproportionate non-capital sentences has been described as “virtually nonexistent.” Rachel E. Barkow, *The Court of Life and Death: The Two Tracks of Constitutional Sentencing Law and the Case for Uniformity*, 107 MICH. L. REV. 1145, 1147 (2009).

<sup>62</sup> D.C. CODE § 22-2803(a)(2) (2013).

<sup>63</sup> See COMMITTEE REPORT OF THE COMMITTEE ON THE JUDICIARY ON BILL 10–16, *Carjacking Prevention Amendment Act of 1993*, at 3 (Feb. 25, 1993).

<sup>64</sup> See Beale, *supra* note 16, at 44–52.

<sup>65</sup> D.C. CODE § 22-2803(a)(1) (2013).

<sup>66</sup> These are the facts in *Young v. United States*, 111 A.3d 13, 14 (D.C. 2015).

<sup>67</sup> As explained *infra* Part IV, an unarmed carjacker would actually face a statutory maximum much greater than 21 years due to the consequences stemming from offense overlap.

<sup>68</sup> E.g., D.C. CODE § 22-4502 (2017).

foregoing phrases is placed in quotes because none reflects its common meaning. Instead, all incorporate a technical, legal definition that reaches far beyond an intuitive understanding, thereby incorporating significant—and consequential—overbreadth into the D.C. Code.

Perhaps most obvious is that the statutory classifications of “crimes of violence” and “dangerous crimes” encompass numerous offenses—such as the District’s robbery and carjacking statutes, as well as the District’s low threshold drug distribution statute<sup>69</sup>—that do not require proof of violence or dangerousness to establish their core elements.<sup>70</sup> Beyond that, many objects that one might not necessarily think of as a “dangerous weapon”—for example, sneakers<sup>71</sup> or teeth<sup>72</sup>—are covered by exceptionally broad judicial constructions of the phrase. And, most significant, the object at issue need not even be employed for the enhancement or aggravator to apply; rather, a “dangerous weapon” that is “readily available” will suffice under the plain terms of the relevant statutes.<sup>73</sup>

To illustrate how these problems intersect, return again to the example involving the stealthy, non-violent theft of a motor vehicle being filled with gas by its owner. Imagine that the defendant was wearing a backpack containing an unloaded firearm—or even a box cutter—at the moment he jumped into the victim’s vehicle. In that case, the defendant would satisfy the elements of the aggravated offense of armed carjacking, based on his or her having a “readily available” weapon in the legal sense required by the statute.<sup>74</sup> And this, in turn, would subject the defendant to a guaranteed 15-year sentence under that statute’s enhanced mandatory minimum, as well as the prospect of 40 years of statutorily authorized maximum punishment.<sup>75</sup>

So far, we’ve only considered problems at the intersection of *explicit* statutory overbreadth and mandatory minima. However, by focusing on the broad meaning of the terms employed in a criminal statute, one misses another critical way that legislatures authorize—and, where mandatory minima are at issue, require—courts to impose extreme sentences: by saying nothing at all. This stems from the fact that statutory offenses exist within a broader universe of general principles of criminal responsibility (sometimes codified, sometimes supplied by the common law), which

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<sup>69</sup> See *id.* at § 48-904.01(a)(1), (a)(2)(A) (2015) (possession with intent to distribute *any* amount of controlled substance subject to 30-year statutory maximum).

<sup>70</sup> See *id.* at §§ 23-1331(3)–(4) (2013) (listing “crimes of violence” and “dangerous crime”).

<sup>71</sup> *Arthur v. United States*, 602 A.2d 174, 179 (D.C. 1992).

<sup>72</sup> *In re D.T.*, 977 A.2d 346, 355 (D.C. 2009).

<sup>73</sup> *E.g.*, D.C. CODE § 22-4502 (2017). This would apply even when an actor deliberately chooses not to use the weapon.

<sup>74</sup> *Id.* at § 22-2803(b)(1) (2013).

<sup>75</sup> *Id.* at § 22-2803(b)(2) (2013).

are read into an offense definition in the absence of an explicit legislative statement to the contrary.<sup>76</sup>

The clearest example is supplied by principles of legal accountability that broadly allow for an accomplice or co-conspirator—however peripheral—to be treated as though he or she directly committed any crime upon proof of having purposely assisted with, or conspired in, its commission.<sup>77</sup> In practice, this means that serving as a getaway driver, lending a hand in preparation, or providing words of encouragement to another person who directly engages in the least blameworthy conduct covered by a given offense is sufficient to open the *supporting actor* to full liability and punishment for that offense.<sup>78</sup>

A more subtle, but equally significant, source of implicit statutory overbreadth is provided by what might be referred to as partial defenses, such as imperfect duress, extreme mental or emotional disturbance, and diminished capacity (in its diminished responsibility form).<sup>79</sup> Roughly speaking, these arise when a person commits an offense with a less blameworthy state of mind that is directly relevant to, but falls short of establishing, a complete excuse defense.<sup>80</sup> The presence of these mitigating factors typically does not preclude proof of the narrow mental state requirement (e.g., purpose, knowledge, or recklessness) required by most criminal offenses; thus, they too are likely to fall within a statute's implied breadth of coverage.<sup>81</sup>

To illustrate the sentencing import of implicit statutory overbreadth, consider another carjacking scenario: the defendant stops a driver at gunpoint and physically forces the victim out of the vehicle and onto the curb before driving away. Blameworthy conduct? Unequivocally. Does it merit the guaranteed 15-year/potential 40-year sentencing range incorporated into the District's carjacking statute? Arguably not—at least when viewed in light of the District's aggravated

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<sup>76</sup> See generally, e.g., Eric A. Johnson, *Dynamic Incorporation of the General Part: Criminal Law's Missing (Hyper)link*, 48 U.C. DAVIS L. REV. 1831 (2015).

<sup>77</sup> See, e.g., JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW § 30.01 (8th ed. 2018); Sanford H. Kadish, *Complicity, Cause and Blame: A Study in the Interpretation of Doctrine*, 73 CAL. L. REV. 323, 337 (1985). Note that, in many jurisdictions, a person who purposely assists with, or conspires in, the commission of one crime may be held fully responsible for any other reasonably foreseeable crimes committed by the principal actor—in the absence of the supporting actor's subjective culpability—under the natural-and-probable-consequences doctrine (for accomplices) and *Pinkerton* doctrine (for co-conspirators). See *id.*

<sup>78</sup> See sources cited *supra* note 77.

<sup>79</sup> See, e.g., Douglas Husak, *Partial Defenses*, in THE PHILOSOPHY OF CRIMINAL LAW 311 (2010); Husak, *supra* note 9, at 460–84; Serota, *supra* note 9, at 1215–16.

<sup>80</sup> See sources cited *supra* note 79.

<sup>81</sup> It bears notice that, in the District, it is difficult to identify the contours of any defense because the D.C. Code does not codify general defenses.

assault offense, which subjects the most horrific beatings short of death to a maximum of 10 years in prison, with no accompanying mandatory minimum.<sup>82</sup>

The potential for disproportionate outcomes in the District's carjacking statute becomes even clearer once one considers that the same 15 to 40-year sentencing range applies in the face of countless mitigating facts. For example, the defendant might have been a 22-year-old suffering from a moderate intellectual disability. Or perhaps the taking was an impulsive decision made by an emotionally distraught parent whose family had been recently evicted from public housing. Alternatively, perhaps the defendant was either explicitly coerced to take the vehicle by a violent drug dealer as repayment for an outstanding debt, or implicitly coerced to take the vehicle as a safe refuge from the repeated sexual assaults she was subjected to at the homeless shelter where she resides. Finally, we should also consider the possibility that the defendant didn't take the vehicle at all, but merely assisted, encouraged, or conspired with someone who did (and who possessed one of these mitigated states of mind). Under the District's general principles of legal accountability, that defendant, too, could be convicted of carjacking, and therefore sentenced to 15 to 40 years of imprisonment.<sup>83</sup>

Having illustrated how statutory overbreadth can facilitate disproportionate sentences for those who engage in classically violent acts, it is necessary to take the analysis one step further by discussing the most violent act of all: murder. Arguably, any policy that affords those who have culpably taken an innocent life with an opportunity to request a more lenient punishment raises its own uniquely challenging set of political and moral considerations. So it is worth considering just who counts as a murderer—and what that means for sentencing purposes—under the D.C. criminal code. What one finds, perhaps unsurprisingly, are precisely the same kinds of problems discussed above.

Consider the District's first-degree murder offense, which subjects any person who "without purpose to do so kills another in perpetrating or in attempting to perpetrate" one of a number of offenses (including robbery) to a 30-year mandatory minimum sentence and the prospect of life imprisonment without the possibility of release.<sup>84</sup> The overarching felony-murder policy reflected in this language can be summarized as follows: District defendants are held strictly liable for any death stemming from their underlying criminal act (that satisfies one of the qualifying offenses), without regard to their culpability as to the fatality, so long as it bears some causal connection to that act.<sup>85</sup>

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<sup>82</sup> D.C. CODE § 22-404.01 (2013); *see infra* Part V for further discussion of the relevance of comparative assessments of proportionality.

<sup>83</sup> *See, e.g.*, D.C. CODE § 22-1805 (2001) (accomplice liability statute); *Gordon v. United States*, 783 A.2d 575, 582 (D.C. 2001) (recognizing judicial adoption of *Pinkerton* liability for co-conspirators).

<sup>84</sup> D.C. CODE § 22-2101 (2001) (definition); D.C. CODE § 22-2104(a) (2013) (penalty).

<sup>85</sup> *In re D.N.*, 65 A.3d 88, 92–93 (D.C. 2013) (citing *Johnson v. United States*, 671 A.2d 428, 433 (D.C. 1995)).



By combining the well-documented overbreadth inherent in strict liability with the overbreadth specific to the District's criminal statutes, this approach to felony murder supports a range of unintuitive outcomes. To illustrate, consider a trio of fatal robbery scenarios, which each involve an accidental death occurring in the absence of a weapon or even the intentional infliction of physical harm.

- (1) The defendant employs minimal force to grab a woman's purse from her shoulder as he runs by. As the purse is pulled off, the woman trips on a curb and suffers a fatal head injury.
- (2) The defendant, armed with an imitation pistol, confronts an older man walking through an alley alone at night, and gently explains that if he hands over his wallet no harm will come to him. The older man goes into shock and dies from a heart attack.
- (3) The defendant jumps in a car being filled with gas at a gas station while the owner is looking in the other direction. Thereafter, while driving away in the victim's vehicle (at the speed limit), he kills a child who—by no fault of the defendant—runs into the street chasing a ball.

Each of the above defendants lacked the intent to kill, let alone cause bodily injury. Nevertheless, all could qualify as murderers under the D.C. criminal code, which would subject these actors to the mandatory 30 years to life sentencing range attached to the District's felony murder statute. And again, the same could also be true of any individual—however peripheral—who purposely assisted with, encouraged, or conspired in the commission of the defendant's unintentionally fatal conduct. Because under general principles of legal accountability, accomplices and other forms of secondary legal actors are wholly liable for the crimes of those whom they support.<sup>86</sup>

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Insofar as retributive proportionality is concerned, the most distressing thing that can be said about the analysis so far is that it only captures a relatively small piece of the sentencing exposure confronting the criminal defendants discussed above. The reason? Because it focuses solely on the liability arising under the most serious offense when, in reality, criminal defendants—both in the District and elsewhere—rarely are charged with only the most serious offense. Rather, they typically confront multiple charges for substantially related offenses for which the convictions and sentencing consequences are aggregated. This is due to the pervasive statutory flaw of offense overlap explored in the next Part.

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<sup>86</sup> *In re D.N.*, 65 A.3d at 93 (citing *Butler v. United States*, 614 A.2d 875, 886 (D.C. 1992)).

## IV. OVERLAPPING OFFENSES

The problem of offense overlap arises from the following tension: criminal codes can cover nearly all forms of wrongdoing with a relatively limited (if carefully drafted) set of offenses; however, elected officials are under tremendous pressure to act in the face of tragedy, and there is arguably no easier way to do so than to pass superfluous criminal statutes.<sup>87</sup> The unfortunate outcome of this “pathological politics,” which has touched every jurisdiction in the nation, are criminal codes replete with related offenses that repetitively criminalize very similar harms.<sup>88</sup> Here again, the District’s carjacking statute provides an illustrative example.

Certainly, the heinous act motivating passage of the carjacking legislation was already subject to liability and punishment for robbery and kidnapping (among other offenses).<sup>89</sup> Nevertheless, a tragedy of this nature cries out for a response, which the enactment of a new and punitive carjacking offense seemed to provide—not only as an expression of support for the victim but as a means of protecting the community from the recurrence of similar conduct.<sup>90</sup> But there is a basic problem with this intuitive legislative logic: we have very little reason to believe that ratcheting up already severe penalties in this way—whether for carjacking or any other offense—effectively deters others from engaging in the proscribed conduct.<sup>91</sup> What the D.C. Council surely did (unintentionally) accomplish, though, was the disproportionate multiplication of convictions and punishments for what is intuitively considered a single criminal act. To understand why, it is necessary to mention the role of one other legal actor: the courts.

The District’s local appellate court, the D.C. Court of Appeals, like many others around the country, has opted to address issues of offense overlap—referred to as “merger” in the judicial context—through the exceedingly narrow (and therefore punitive) elements test.<sup>92</sup> The central question presented by merger is: how should the court deal with multiple convictions for substantially related criminal offenses arising from a single course of conduct—namely, should the lesser conviction(s) merge (and therefore be vacated)? The response provided by the elements test is:

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<sup>87</sup> See, e.g., sources cited *supra* notes 15–16.

<sup>88</sup> See *id.*

<sup>89</sup> See *infra* notes 95–105 and accompanying text; see also Erik Luna, *The Overcriminalization Phenomenon*, 54 AM. U. L. REV. 703, 708 (2005) (observing that “Congress has adopted repetitive and overlapping statutes,” such as “mostly superfluous offenses like ‘carjacking’ that deal with conduct addressed by existing provisions such as robbery and kidnapping”).

<sup>90</sup> See, e.g., Harry A. Chernoff et al., *The Politics of Crime*, 33 HARV. J. ON LEGIS. 527 (1996).

<sup>91</sup> This is due to, among other reasons, how little would-be criminals actually know about criminal penalties. See, e.g., Daniel S. Nagin, *Deterrence in the Twenty-First Century*, 42 CRIME & JUST. 1975 (2013). For excellent discussions of this issue, and its political and policy implications, see sources cited *supra* note 17. And for two helpful reference guides on the current state of research on deterrence and incapacitation, see sources cited *supra* note 18.

<sup>92</sup> See, e.g., *Byrd v. United States*, 598 A.2d 386, 388 (D.C. 1991) (en banc).

vacate the lesser offense(s) when—but only when—it would be impossible to commit one without also committing the other (under any imaginable set of circumstances).<sup>93</sup> The corollary is that where it is even theoretically possible to commit one offense without committing the other—say, for example, because of a technical distinction not implicated in the defendant’s case—then both convictions must remain and the sentencing consequences must be aggregated.<sup>94</sup>

This formalistic approach to merger, when paired with the District’s broad and overlapping set of criminal statutes, subjects a vast array of questionably characterized “violent crimes” to the possibility of an effective life sentence. To illustrate, reconsider the stealthy gas station theft successfully committed, without force or violence, by a defendant wearing a backpack storing an unloaded firearm. On these facts, the defendant would satisfy the requirements of liability for at least six offenses in the D.C. Code: (1) armed carjacking (15-year mandatory minimum/40-year statutory maximum);<sup>95</sup> (2) robbery while armed (5 to 10-year mandatory minimum/45-year statutory maximum);<sup>96</sup> (3) felony theft (10-year statutory maximum);<sup>97</sup> (4) unlawful use of a vehicle (5-year statutory maximum);<sup>98</sup> (5) possession of a firearm during a crime of violence (5-year mandatory minimum/15-year statutory maximum);<sup>99</sup> and (6) carrying a pistol without a license (5-year statutory maximum).<sup>100</sup> Due to narrow differences in statutory definition, none of these offenses would merge with any other under the elements test.<sup>101</sup> The result? For commission of what is most aptly described as a non-violent vehicular

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<sup>93</sup> See, e.g., Michael T. Cahill, *Offense Grading and Multiple Liability: New Challenges for A Model Penal Code Second*, 1 OHIO ST. J. CRIM. L. 599, 606 (2004); Anne Bowen Poulin, *Double Jeopardy and Multiple Punishment: Cutting the Gordian Knot*, 77 U. COLO. L. REV. 595, 596 (2006).

<sup>94</sup> Consider an illustrative example. Although the District’s robbery and carjacking offenses employ nearly identical terminology, there are also some minor distinctions, such as the fact that the District’s carjacking statute requires the theft of a *car* but does not require success—whereas the robbery statute requires completed asportation, but not the theft of a car (stealing any property will suffice). Stemming from these minor distinctions, it is therefore possible to commit carjacking—via an unsuccessful attempt to take possession of the victim’s vehicle—without committing robbery (which requires asportation); and it is also possible to commit robbery—via the theft of property other than a vehicle from another’s person—without committing carjacking. As a result, these offenses would not merge under the elements test. *Pixley v. United States*, 692 A.2d 438, 440 (D.C. 1997).

<sup>95</sup> D.C. CODE § 22-2803(b)(1) (2013).

<sup>96</sup> See *id.* at § 22-2801 (2013) (robbery), § 22-4502 (2017) (while armed enhancement).

<sup>97</sup> *Id.* at § 22-3212(a) (2016).

<sup>98</sup> *Id.* at § 22-3215(d)(1) (2013).

<sup>99</sup> *Id.* at § 22-4504(b) (2015).

<sup>100</sup> *Id.* at § 22-4504(a)(1) (2015).

<sup>101</sup> See, e.g., *Pixley*, 692 A.2d at 440 (rejecting merger claim for carjacking and robbery); *Foreman v. United States*, 988 A.2d 505, 506 n.1 (D.C. 2010) (parties agreeing that felony theft is not a lesser-included offense of armed robbery); *Stevenson v. United States*, 760 A.2d 1034, 1035 (D.C. 2000) (“[C]onvictions for PFCV do not merge into the predicate armed offenses.”); see also *supra* note 94.

theft offense, this defendant would face an aggregate mandatory minimum of at least 25 years, and a concomitant statutory maximum of well over a century.<sup>102</sup>

This is only the beginning of the sentencing exposure implicated by the District's overlapping offenses. As the fact pattern veers closer toward what one might think of as a heartland, violent carjacking, both the number of convictions and aggregated liability grow greater yet. Imagine, for example, that the defendant employed a violent threat to facilitate the carjacking (e.g., "hand over your car, or else"). In that case, his conduct would support another non-merging conviction—and an additional 20 years of potential prison time—under the District's felony threats offense.<sup>103</sup> Now consider the possibility that the driver resisted, thereby leading the defendant to forcefully remove the driver. This would support yet another non-merging conviction—and an additional 30 years of potential prison time—under the District's kidnapping offense.<sup>104</sup> And finally, if, upon arrest, it turned out that the defendant's backpack contained an amount of marijuana (or some other controlled substance) sufficient to persuade the factfinder of an intent to distribute, then that too would support another non-merging conviction—and an additional 30 years of potential prison time—under the District's controlled substances statutes.<sup>105</sup>

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It is worth reiterating that the goal of this analysis is not to illustrate the injustice of the District's treatment of robbery, carjacking, or any of the other crimes analyzed above (though it may do that). Rather, it is to highlight generalizable ways that the problems of statutory overbreadth, mandatory minima, and offense overlap converge to authorize—and in some instances require—the imposition of extreme sentences for conduct that is of comparatively minimal blameworthiness. As I will explain in the next part of this Essay, this provides us with little confidence in the systemic proportionality of the District's sentencing decisions (or those being imposed elsewhere). And it also offers a compelling reason to authorize courts to reevaluate (and in appropriate cases reduce) long-term punishments through second-look sentencing reform, both in the District and beyond.

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<sup>102</sup> Here, it is worth noting that, in general, District judges retain discretion to run sentences concurrently should they so choose, but are also encouraged to run them consecutively in many (if not most) cases. See D.C. CODE § 23-112 (2001) (general default consecutive sentencing); D.C. Super. Ct. R. Crim. P. 32 (same); *cf.* D.C. CODE § 22-3215(2)(A)(i) (2013) (specific rule of consecutive sentencing for unauthorized use of a motor vehicle during crime of violence).

<sup>103</sup> D.C. CODE § 22-407 (2013); *see In re Z.B.*, 131 A.3d 351, 353 (robbery and threats do not merge).

<sup>104</sup> D.C. CODE § 22-2001 (2013); *see Monroe v. United States*, 600 A.2d 98, 99 (D.C. 1991) (armed robbery and kidnapping do not merge).

<sup>105</sup> D.C. CODE § 48-904.01(2)(a) (2015).

## V. STATUTORY INJUSTICE &amp; SECOND LOOKS

What are the prerequisites of a (retributively) proportionate sentence? This is arguably one of the most complex and contested issues in legal theory; however, it is also one that a jurisdiction's political morality offers a relatively straightforward answer to, at least in broad strokes.<sup>106</sup> At its most basic level, a proportionate sentence is one that tracks a defendant's blameworthiness, which is a product of two general criteria: social harm and state of mind.<sup>107</sup> Specifically, the general formula governing retributively-based proportionality assessments operates accordingly:

- (1) the greater the severity of the social harm caused or threatened by the defendant, and
- (2) the more culpable the defendant's state of mind,<sup>108</sup>
- (3) the more blameworthy he or she is, and
- (4) the more punishment that he or she deserves.<sup>109</sup>

Beyond that, we also tend to have a pretty good (though far from incontrovertible) sense of what makes different forms of conduct more or less blameworthy than one another: the extent to which they manifest a culpable disregard of the legally protected interests of others.<sup>110</sup> To be sure, the precise mechanism through which this qualitative accounting of blameworthiness translates into quantitative determinations of sentence length is a metaphysical mystery.<sup>111</sup>

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<sup>106</sup> For further discussion of and support for this idea, see Serota, *supra* note 9, at 1202–14 (drawing on Michael Serota & Ethan J. Leib, *The Political Morality of Voting in Direct Democracy*, 97 MINN. L. REV. 1596 (2013)).

<sup>107</sup> See, e.g., Douglas N. Husak, *Already Punished Enough*, 18 PHIL. TOPICS 79, 82 (1990); and the sources cited *supra* note 9.

<sup>108</sup> To be more specific, there are four main criteria bearing on an actor's psychological blameworthiness: (1) awareness of risk; (2) reasons for creating, disregarding, or failing to attend to a risk; (3) normative competence; and (4) situational control. See Serota, *supra* note 9, at 1204–05 (exploring these factors).

<sup>109</sup> See, e.g., Youngjae Lee, *The Constitutional Right Against Excessive Punishment*, 91 VA. L. REV. 677, 700–04 (2005); Husak, *supra* note 9, at 454–55; see also Paul H. Robinson, *The A.L.I.'s Proposed Distributive Principle of "Limiting Retributivism": Does It Mean in Practice Anything Other than Pure Desert?*, 7 BUFF. CRIM. L. REV. 3, 5 (2003) ("By 'punishment according to desert' I mean punishment according to the offender's personal blameworthiness for the past offense, which takes account not only of the seriousness of the offense but also the full range of culpability, capacity, and situational factors that we understand to affect an offender's blameworthiness.").

<sup>110</sup> See, e.g., Gideon Yaffe, *The Point of Mens Rea: The Case of Willful Ignorance*, 12 CRIM. L. & PHIL. 19 (2016); Peter Westen, *Individualizing the Reasonable Person in Criminal Law*, 2 CRIM. L. & PHIL. 137 (2008); Kenneth W. Simons, *Rethinking Mental States*, 72 B.U. L. REV. 463 (1992); Jean Hampton, *An Expressive Theory of Retribution*, in RETRIBUTIVISM AND ITS CRITICS 12 (Wesley Cragg ed., 1992).

<sup>111</sup> See, e.g., Youngjae Lee, *Why Proportionality Matters*, 160 U. PA. L. REV. 1835 (2012).

What we do know, though, is that people have a rough sense of which punishments are absolutely unjust (what is referred to as cardinal proportionality),<sup>112</sup> as well as a much clearer sense of which punishments are comparatively unjust in light of the way we punish other offenses/offenders (what is referred to as ordinal proportionality).<sup>113</sup>

So, with that backdrop in mind, let us now return to the question presented earlier: do we have reason to feel secure in the systemic proportionality of the long-term sentencing judgments handed down by District courts? Based upon the analysis of the preceding sections, I do not believe that we do—for three main reasons.

First, the combined effect of statutory overbreadth and offense overlap authorizes District judges to impose extreme sentences in a surprisingly large number of situations involving conduct of comparatively minimal blameworthiness.<sup>114</sup> How often have the District's sentencing courts actually meted out punishments that exceed any reasonable conception of proportionality? It is hard to be sure, and there are undoubtedly countervailing forces—including sentencing courts' own views of justice—that counsel against it. That said, there are also influential ideas engrained in our socio-legal culture—for example, the empirically suspect idea that increasing punishment severity effectively promotes deterrence<sup>115</sup>—that do motivate judges to make sentencing judgments extending far beyond the confines of justice.<sup>116</sup> And notably, there are no enforceable legal limitations in the District—aside from the U.S. Supreme Court's lax interpretation of the Eighth Amendment—to stop a judge from heading down that path.<sup>117</sup>

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<sup>112</sup> See, e.g., MODEL PENAL CODE § 1.02(2), illus. (AM. LAW INST., Proposed Official Draft 2017); NORVAL MORRIS & MICHAEL TONRY, BETWEEN PRISON AND PROBATION: INTERMEDIATE PUNISHMENTS IN A RATIONAL SENTENCING SYSTEM 104–05 (1991). Which is to say, the principle of retributive proportionality establishes “rough outer limits . . . beyond which penalties would be widely seen as clearly *undeserved* (i.e., either excessively severe or excessively lenient).” Richard S. Frase, *Sentencing Principles in Theory and Practice*, 22 CRIME & JUST. 363, 368 (1997) (emphasis in original).

<sup>113</sup> See, e.g., Robinson & Kurzban, *supra* note 9; ANDREAS VON HIRSCH, DESERVED CRIMINAL SENTENCES, ch. 5 (2017). For arguments that retributive justice has both comparative and noncomparative dimensions, and that the justice of the punishment one receives is a function of both, see Ronen Avraham & Daniel Statman, *More on the Comparative Nature of Desert: Can a Deserved Punishment Be Unjust?*, 25 UTILITAS 316 (2013); Lee, *supra* note 109, at 711–14.

<sup>114</sup> See *supra* Parts III & IV.

<sup>115</sup> See sources cited *supra* notes 17–18.

<sup>116</sup> It should be noted that these ideas are also given voice in District criminal law. See, e.g., D.C. CODE § 24-403.01(a)(2) (2019) (directing courts to impose a punishment that “affords adequate deterrence to potential criminal conduct of the offender and others”); *Lloyd v. United States*, 806 A.2d 1243, 1250 (D.C. 2002) (applying deterrence principles to support adoption of expansive transferred intent liability).

<sup>117</sup> See *supra* note 60.

Second, where mandatory minima are introduced into the equation, District judges may have no choice but to impose disproportionate sentences.<sup>118</sup> When combined with overbroad statutes, these one-size-fits-all penalties subject individuals who should not even be covered by a particular statute to sentences that are arguably only appropriate for the most blameworthy violators.<sup>119</sup> On top of that, there is the compounding injustice that occurs in the face of overlapping—and non-merging—penalty provisions of this nature. Fortunately, the D.C. Code has comparatively fewer mandatory minima than many other jurisdictions.<sup>120</sup> Nevertheless, the mandatory minima applicable to the District’s overbroad—and broadly applicable—weapons enhancements by themselves reach a significant amount of criminal activity, both on their own and in conjunction with general principles of legal accountability.

Third, and perhaps most subtle (though just as important), is the inevitability of comparatively disproportionate sentences.<sup>121</sup> This is due to the twofold realities that: (1) in many cases, judges are left with sweeping low-to-high-end discretion in the calibration of a criminal sentence; and (2) that discretion operates in the absence of much, if any, direction concerning how to account for morally salient distinctions between offenders.<sup>122</sup> This broad delegation is problematic because we have little

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<sup>118</sup> See *supra* Part III; see also, e.g., *Moorer v. United States*, 868 A.2d 137, 140 (D.C. 2005) (trial court, in applying the District’s carjacking offense, observed: “I do not believe that this is a case that warrants seven years of mandatory time. I believe it to be completely disproportionate to the facts of this case, but I am a judge bound to apply the law, and I will apply it.”).

<sup>119</sup> It is worth noting that this may have been a feature (rather than an unexpected byproduct) of these statutes given legislative adherence to principles of incapacitation and deterrence in the District—both locally and federally—during the second half of the twentieth century. See, e.g., FORMAN, *supra* note 22, at chs. 1, 7 (describing incapacitative goals motivating enactment of D.C. gun and drug legislation); Barkow, *supra* note 17, at 219–26 (providing the same with respect to comparable federal legislation).

<sup>120</sup> In this sense, the District’s carjacking and first-degree murder statutes are at least somewhat exceptional.

<sup>121</sup> This paragraph focuses on systemic bases for comparative disproportionality in the District. However, there are also many obvious localized problems. Consider, for example, that the statutory maximum governing the most heinous assault, short of death, is 10 years under District law, which is the same statutory maximum facing someone who steals, or attempts to destroy, property worth more than \$1,000. D.C. CODE § 22-404.01 (2013) (aggravated assault); D.C. CODE § 22-3212 (2016) (theft); D.C. CODE § 22-303 (2013) (malicious destruction of property). Conversely, under District law, a person who merely threatens bodily injury will confront up to 20 years of imprisonment, while someone who possesses any amount of a controlled substance with intent to distribute will confront up to 30 years of imprisonment. D.C. CODE § 22-407 (2013) (felony threats); D.C. CODE § 48-904.01(a)(2)(A) (2015) (possession with intent to distribute).

<sup>122</sup> To be sure, the District’s voluntary sentencing guidelines provide a kind of guidance (albeit unenforceable) by calibrating the sentencing ranges for individual offenses with prior criminal history. See D.C. SENT’G AND CRIM. CODE REVISION COMM’N, VOLUNTARY SENT’G GUIDELINES MANUAL § 2.3 (2019). However, this binary, grid-like approach simply leaves it to courts to determine the comparative penal import of a wide array of mitigating and aggravating factors that fall within an overbroad offense definition. See Serota, *supra* note 9, at 1218–19.

reason to believe that individual sentencing judges acting on their own accord will carry out this undertaking in a uniform way—let alone carry it out at all.<sup>123</sup> And this is to say nothing of the roadblocks that harsh mandatory minima pose to the pursuit of comparatively proportionate sentences—that is, they may set the statutory baseline so high that judges are either unable or unwilling to individualize a sentence to reflect material distinctions in blameworthiness between offenders, based on variances in social harm and/or state of mind.<sup>124</sup>

These are only three of the most direct legal bases for questioning the systemic proportionality of the District's sentencing scheme. Yet there are many other indirect, structural bases that are similarly worrisome and thus worth mentioning. Perhaps most significant (and well-documented) is the corrosive incentive that mandatory minimum punishments create for innocent actors to enter guilty pleas.<sup>125</sup>

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<sup>123</sup> This is so for at least two reasons. First, the confounding influence of utilitarian principles may lead some courts to treat factors that mitigate blameworthiness as aggravating punishment. For example, courts, relying on theories of incapacitation and deterrence, might impose more severe sentences in light of a defendant's immaturity, extreme mental or emotional disturbance, or diminished capacity (in its diminished responsibility form). See, e.g., Paul H. Robinson, *Hybrid Principles for the Distribution of Criminal Sanctions*, 82 NW. U. L. REV. 19 (1987). Second, the well-documented variances between sentencers in their overall severity suggests that even courts that singularly focus on doing justice would still likely hand down comparatively disproportionate sentences. See Serota, *supra* note 9, at 1213; Robinson & Kurzban, *supra* note 9, at 1854–55.

To illustrate, consider the following scenarios:

- (1) D1 commits vehicular theft and is sentenced by J1 to 10 years in prison. J1 is a severe sentencer who believes that intentional murder should be subject to 40 years in prison, and that intentional aggravated assault should be subject to 20 years in prison.
- (2) D2 commits aggravated assault and is sentenced by J2 to 10 years in prison. J2 is a moderate sentencer who believes that intentional murder should be subject to 20 years in prison, and that vehicular theft should be subject to 5 years in prison.
- (3) D3 commits intentional murder and is sentenced by J3 to 10 years in prison. J3 is a lenient sentencer who believes that aggravated assault should be subject to 5 years in prison, and that vehicular theft should be subject to 2.5 years in prison.

In each of these cases, the sentence meted out seems fair in light of that judge's sentencing patterns. Between cases, however, variances in judges' overall sentencing severity lead to the imposition of identical punishments for acts of widely varying blameworthiness, thereby producing a distribution of punishment that is ordinarily disproportionate when the sentences are viewed in light of one another.

<sup>124</sup> See, e.g., Stephanos Bibas, *Plea Bargaining Outside the Shadow of Trial*, 117 HARV. L. REV. 2463 (2004). This is at least generally reflected in the fact that the sentences in many cases involving mandatory minima often track the minimum punishment. Memorandum #28 from the D.C. Crim. Code Reform Comm'n to Advisory Group Members (Oct. 21, 2019) <https://ccrc.dc.gov/node/1438011> (finding that, between 2009 and 2018, the median sentences for carjacking, armed carjacking, and murder simply reflect the 7-year, 15-year, and 30-year mandatory minima governing those offenses).

<sup>125</sup> See, e.g., Stuntz, *supra* note 15; Erik Luna & Paul G. Cassell, *Mandatory Minimalism*, 32 CARDOZO L. REV. 1, 67–69 (2010); Scott Hechinger, *How Mandatory Minimums Enable Police Misconduct*, N.Y. TIMES (Sept. 25, 2019), <https://www.nytimes.com/2019/09/25/opinion/mandatory-minimum-sentencing.html>.



And the same is almost surely true of the comparatively high statutory maxima arising from the District's overbroad and overlapping offenses. For even in the absence of a mandatory extreme sentence, a prosecutor's ability to threaten the prospect of one leaves defendants with a difficult choice between pleading down to some less disproportionate charge(s), or risking the possibility of serving decades—if not a lifetime—in prison, even in cases in which the defendant may not have actually committed the offense.

To be sure, all of the above problems hinge upon prosecutorial charging decisions, in which case one could argue that the sound exercise of government discretion constitutes a failsafe. However, neither the relatively scant published judicial opinions reflecting USAO-DC's actual charging decisions, nor the manner in which the Office has comported itself in lobbying against the Second Look Amendment Act, provides much of a basis for placing one's faith in the perennial "trust us" retort.<sup>126</sup> And that is to say nothing of the ever-expanding scholarly literature on the influence of implicit (racial) bias on legal decision-making, which provides good reason to be skeptical of affording even the best-intentioned government actors the kind of discretion outlined above.<sup>127</sup>

What the District is therefore left with is a sentencing system that routinely authorizes, and sometimes requires, the imposition of disproportionate, decades-long punishments. Which is not to claim that all—or even most—of the sentences meted out by the District's criminal justice system are, in fact, disproportionate. But it is to question the likelihood that the District's long-term sentences are proportionate over time and across cases. And that is significant. Because for those who believe that aligning punishment with blameworthiness is a critical goal of criminal sentencing, this epistemic uncertainty—and the concomitant possibility of systemic disproportionality—materially alters the normative calculus surrounding adoption of second-look sentencing. That is, instead of creating a mechanism for disrupting justice, second-look review may instead provide courts with an important opportunity to materially diminish the overall level of disproportionality in the criminal justice system, while at the same time maximizing important utilitarian values—such as rehabilitation, familial and community reintegration, and the efficient use of incarceration—through measured sentencing reductions.

Implicit in this argument is an acknowledgement that the judicial reevaluations authorized by second-look sentencing will rarely be pristinely executed on strictly

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<sup>126</sup> See also DEP'T OF JUST., JUST. MANUAL § 9-27.300 ("Once the decision to prosecute has been made, the attorney for the government should charge and pursue the most serious, readily provable offenses. By definition, the most serious offenses are those that carry the most substantial guidelines sentence, including mandatory minimum sentences.").

<sup>127</sup> See, e.g., sources cited *supra* note 22; see also Michael Serota, *Mens Rea, Criminal Responsibility, and the Death of Freddie Gray*, 114 MICH. L. REV. FIRST IMPRESSIONS 31, 39 (2015) ("In the absence of a coherent legal framework that provides an intelligible basis for making the critical distinctions in mens rea, it seems highly likely that arbitrary and discriminatory factors could be used by decisionmakers—whether consciously or unconsciously—to fill in the gap.").

retributivist terms. In theory, second-look review provides temporally distant and structurally independent courts an opportunity to take a clear-eyed look at the proportionality of a sentence, insulated from the punitive pathologies and predisposition toward severity that so often distort penal decision-making. Yet there is no guarantee that a later-in-time sentencer will be able to identify a perfectly proportionate sentence (as opposed to one that is simply less disproportionate<sup>128</sup>), or will be entirely free of the influence of these dynamics, a decade or more after the fact.<sup>129</sup>

Nor, for that matter, should we expect judges to single-mindedly focus on furthering the principle of retributive proportionality during second-look review. After all, both actual and model second-look provisions explicitly invite judges to consider utilitarian ends in determining whether to grant a petition for a sentencing reduction.<sup>130</sup> And while distributing sentencing reductions in accordance with desert may be the best way to increase public safety in the long run (the theory of “empirical desert”<sup>131</sup>), that is not necessarily the position those implementing second-look review will endorse.<sup>132</sup> So it is only inevitable that courts—relying, for example, on the principle of dangerousness, rather than empirical desert—will on occasion withhold or award reductions in a manner that conflicts with the principle of retributive proportionality.<sup>133</sup>

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<sup>128</sup> For example, it may be clear that any of the principal or supporting actors who received a mandatory minimum sentence for armed carjacking or felony murder under District law in the kinds of mitigating circumstances enumerated above received a disproportionately severe sentence. *See supra* Part III. But it may also be difficult to determine what a reasonably proportionate sentence would look like given the difficulty of reconstructing the factual circumstances and the ordinal ranking of punishments imposed more than a decade ago (among other reasons). *See supra* notes 114, 123.

<sup>129</sup> *See* MODEL PENAL CODE: SENTENCING § 305.6, cmt. at 567 (AM. LAW INST., Proposed Official Draft 2017) (noting the potential for “disparity in outcomes” in second-look sentencing due to “the idiosyncrasies of individual judges” and the “politically charged” nature of cases that “will by definition include the most serious offenses and the most blameworthy offenders”).

<sup>130</sup> *See* D.C. CODE § 24-403.03(a)(2), (c) (2019) (making utilitarian considerations, such as dangerousness, rehabilitation, and familial and community circumstances, central to judicial inquiry); MODEL PENAL CODE: SENTENCING § 305.6(4) (AM. LAW INST., Proposed Official Draft 2017) (recommending judicial inquiry be based on revised statement of sentencing purposes, § 1.02(2), which incorporates utilitarian considerations); *cf.* Robinson, *supra* note 109, at 5 (explaining why, in theory, there should be few instances “in which the distribution of punishment will be guided by a principle other than desert” under the revised MPC statement of sentencing purposes).

<sup>131</sup> *See, e.g.*, PAUL H. ROBINSON, *INTUITIONS OF JUSTICE AND THE UTILITY OF DESERT* (2013) (arguing, based on relevant social science literature, that a distributive principle of blameworthiness proportionality is the most effective utilitarian crime-control device).

<sup>132</sup> *See, e.g.*, Richard S. Frase, *Punishment Purposes*, 58 STAN. L. REV. 67, 70–73 (2005) (highlighting the central role of narrow utilitarian considerations in state and federal sentencing).

<sup>133</sup> *See also* MODEL PENAL CODE: SENTENCING § 305.6, cmt. at 576 (AM. LAW INST., Proposed Official Draft 2017) (noting that, in a second-look evaluation, “the unserved balance of an applicant’s prison sentence might be justified on the reasonable belief that the offender presents a continuing

And yet, in the final analysis, the central policy question confronting second-look reform is not whether judicial sentencing reductions will perfectly, or uniformly, promote retributive proportionality in all cases. Instead, it is whether the reductions (across cases): (1) materially decrease the *overall* level of disproportionality reflected in the criminal justice system; and (2) on balance, improve overall societal welfare. It is not hard to imagine how reevaluating the costs and benefits of a long-term sentence alongside a decade or more of new information about an inmate's rehabilitative state and risk of recidivism—and in light of relevant criminological advancements—could promote the latter set of welfarist interests, given the forward-looking nature of the utilitarian calculus.<sup>134</sup> But given this Essay's analysis of the penal import of flawed crime legislation in the District, second-look reform may also afford judges with a valuable opportunity<sup>135</sup> to both

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danger to the community," such that "the original sentence should remain undisturbed on incapacitation grounds").

On the other hand, in at least some situations, sentencing reductions based on criteria unrelated to an actor's blameworthiness at the time the crime was committed—for example, effective rehabilitation—may actually find support in community sentiment. See Paul H. Robinson et al., *Extralegal Punishment Factors: A Study of Forgiveness, Hardship, Good Deeds, Apology, Remorse, and Other Such Discretionary Factors in Assessing Criminal Punishment*, 65 VAND. L. REV. 737, 820 (2012) (finding that post-offense, pre-sentencing mitigation based on rehabilitation has "significant support," "can carry with it a substantial reduction in punishment," and "becomes more attractive, not less, as offense seriousness increases").

<sup>134</sup> MODEL PENAL CODE: SENTENCING § 305.6, cmt. at 569–70 (AM. LAW INST., Proposed Official Draft 2017). Which is not to ignore the numerous costs implicated by second-look sentencing—for example, its "effects on finality, consumption of governmental resources, potential political divisiveness, and other[s]." Ryan, *supra* note 1, at 158. Indeed, these are of significant concern. Cf. Michael Serota, *Stare Decisis and the Brady Doctrine*, 5 HARV. L. & POL'Y REV. 415, 427–30 (2011) (exploring "rule of law" costs inherent in abrogating stare decisis). But as others have argued, ultimately the "numerous, valid grounds for sentence modification must be accommodated, to avoid the injustice and waste of sentences that no longer fit the crime and/or the offender." Richard S. Frase, *Second Look Provisions in the Proposed Model Penal Code Revisions*, 21 FED. SENT. R. 194, 201 (2009). See Ryan, *supra* note 1, at 161 ("This position appears to represent a consensus among legal commentators on the issue."); see also Berman, *supra* note 2, at 152 (arguing that "history combines with modern mass incarceration in the United States to call for policy-makers, executive officials, and judges now to be less concerned about sentence finality, and to be more concerned about punishment fitness and fairness . . .").

<sup>135</sup> And this is so regardless of age: although the SLAA would only extend second-look review under the IRAA to those younger than 25 at the time of conviction, the analysis in this Essay is not so limited. Immaturity is surely an important consideration for purposes of retributive proportionality; however, it's just one form of mitigation for which District sentencing may fail to appropriately account. See *supra* Part III. Of course, there may be good utilitarian reasons to take a more incremental approach. For example, given limited resources, political sensitivities, and/or the prospects of successful rehabilitation, it may very well make pragmatic sense to focus on, or begin with, those who were younger than 25 when sentenced for legislative purposes. See Frank O. Bowman, III, *Freeing Morgan Freeman: Expanding Back-End Release Authority in American Prisons*, 4 WAKE FOREST J.L. & POL'Y 9, 46–47 (2014) (discussing pragmatic considerations relevant to second-look reform). At the very least, though, it is a decision that should be made carefully, particularly in light of the analytical context provided in this Essay.

identify and remediate situations of clearly discernible retributive injustice in cases involving the most extreme sentences.<sup>136</sup>

Which raises a broader question: just how generalizable is this Essay's analysis of crime legislation and sentencing proportionality *within* the District to the prospect of undertaking second-look sentencing reform *outside* of the District? That largely depends upon the extent to which the criminal codes of other jurisdictions contain problems similar to those explored above. In this regard, my experience analyzing nationwide crime legislation, as well as the scholarly literature on criminal code reform, indicate that the District is by no means an outlier.<sup>137</sup> Rather, the threefold flaws of statutory overbreadth, mandatory minima, and offense overlap seem to pervade criminal codes around the country.<sup>138</sup> What's more, the District appears to have a relative dearth of mandatory minima, which renders the likelihood of statutorily mandated injustice arising under the D.C. Code materially *lower* than might be the case in other jurisdictions.

On the other hand, there certainly are features of the District's local crime legislation (and broader justice system) that, if not categorically distinct, may at least be distinctly disconcerting.<sup>139</sup> For example, many of the District's frequently charged criminal statutes—robbery, kidnapping, and homicide, just to name a few—combine low threshold elements with high statutory maxima in an uncharacteristically egregious manner.<sup>140</sup> In many jurisdictions, the potential for disproportionality inherent in this large delegation of sentencing discretion would be safeguarded by legally enforceable sentencing guidelines; however, the District is also one of a comparatively small number of jurisdictions with sentencing guidelines that are wholly voluntary.<sup>141</sup> That means the only legal limits on severe punishments in the District are the broad (and rarely enforced) strictures of the

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<sup>136</sup> For more detailed explanations as to how the principle of retributive proportionality can be operationalized as the basis for making fact-specific determinations of sentencing severity, see VON HIRSCH & ASHWORTH, *supra* note 9; and sources cited *supra* notes 112, 113, 131. And for discussion of how to reconcile potentially conflicting community and philosophical views on deserved punishment in this process, see Serota, *supra* note 10, at 1204–07.

<sup>137</sup> See, e.g., Robinson et al., *supra* note 54; Luna, *supra* note 89.

<sup>138</sup> For a collection and excellent illustration of comparable legislative flaws arising in other jurisdictions, see BARKOW, *supra* note 15, at ch. 1.

<sup>139</sup> From a codification perspective, the D.C. Criminal Code may be a problematic outlier in other ways—for example, due to its failure to incorporate general culpability or defense provisions. See generally Memorandum #2 from the D.C. Crim. Code Reform Comm'n to Advisory Group Members (Dec. 21, 2016), <https://ccrc.dc.gov/publication/advisory-group-memo-2-adoption-comprehensive-general-part-revised-criminal-code>. This is one codification problem, among many others, that the legislative recommendations of the D.C. Criminal Code Reform Commission seek to remedy. See *infra* note 144.

<sup>140</sup> See *supra* Parts III & IV.

<sup>141</sup> See, e.g., Richard S. Frase, *State Sentencing Guidelines: Diversity, Consensus, and Unresolved Policy Issues*, 105 COLUM. L. REV. 1190 (2005).

Eighth Amendment.<sup>142</sup> Finally, in the event that a retributively unjust sentence is imposed in the District, there is comparatively little room for back-end relief because the District also happens to be one of a minority of jurisdictions that requires its prisoners (through Truth-in-Sentencing) to serve at least 85% of their sentences.<sup>143</sup>

Viewed in context, then, there may be some ways in which the potential for disproportionate sentencing outcomes under the D.C. Code is more pronounced than in other jurisdictions, as well as at least one particularly important way—namely, the frequency of mandatory minima—in which that risk may be comparatively less significant. But to the extent that there are material variances in these other jurisdictions’ criminal legislation and sentencing practices, these are likely differences in scale, rather than kind. In which case the risk of retributive injustice arising under the criminal laws in other jurisdictions would also seem—for the reasons discussed in this Essay—to weigh in favor of affording a second look to those sentenced to long-term stays of incarceration.<sup>144</sup>

## VI. CONCLUSION

For those who believe in the retributive ideal of proportionate punishment, the current state of criminal legislation in this country should be worrisome. The three pervasive legislative flaws described above—statutory overbreadth, mandatory minima, and offense overlap—provide little reason to trust that the criminal justice system is distributing punishment in a manner that appropriately reflects the seriousness of offenders’ conduct and the blameworthiness of their accompanying state of mind. Second-look policies afford one potentially fruitful pathway for identifying—and hopefully remedying—this injustice for those who receive the most extreme sentences.

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<sup>142</sup> See Barkow, *supra* note 61.

<sup>143</sup> See Turner, *supra* note 26.

<sup>144</sup> To be sure, second-look sentencing is not the only means of addressing retributive injustice, inside the District or beyond. Arguably, the most direct and effective way to ameliorate the disproportionality of a jurisdiction’s sentencing judgments is through revision of the criminal statutes upon which they’re based. Fortunately, the D.C. Criminal Code Reform Commission has been doing just that, steadily developing “comprehensive criminal code reform recommendations,” which include more “proportionate penalties,” for the D.C. Council. D.C. CODE § 3-152 (2019). One can only hope that these recommendations will become law for all of the reasons highlighted in this Essay. See generally *id.*